86-750

No. .....

In The Supreme Court

OF THE

United States

OCTOBER TERM, 1986

SIMPSON PAPER COMPANY,
Petitioner,

v.

DIVISION OF OCCUPATIONAL SAFETY AND HEALTH OF THE DEPARTMENT OF INDUSTRIAL RELATIONS FOR THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE THIRD APPELLATE DISTRICT

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QUESTION PRESENTED

Whether federal labor law preempts a state agency's order where that order is contrary to the employer's collective bargaining agreement and an arbitration award under that agreement and where the order attempts to alter the economic terms of the agreement.

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below are all named in the caption.

Petitioner, Simpson Paper Company, is wholly owned by Simpson Timber Company which is wholly owned by Simpson Investment Company which is wholly owned by Kamilche Company. Petitioner has no subsidiaries other than wholly owned subsidiaries. The affiliates of Petitioner are:

Commencement Bay Mill Company
Pacific Western Extruded Plastics Company
Simpson Building Supply Company
Simpson Export Sales Company
Simpson Foreign Sales Corporation
Simpson Properties, Inc.
Simpson Redwood Company
Simpson Timber Co. (British Columbia) Ltd.
Simpson Timber Co. (Saskatchewan) Ltd.
SLC, Inc.
The Arcata and Mad River Rail Road Company

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE THIRD APPELLATE DISTRICT

The Petitioner, Simpson Paper Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California in and for the Third Appellate District, rendered in the above-entitled proceeding on June 23, 1986.

OPINION BELOW

The opinion of the Court of Appeal in and for the Third Appellate District has not been reported. It is reprinted in Appendix A hereto, p. A-1, *infra.*

The order denying Petitioner's petition for rehearing by the Court of Appeal for the Third Appellate District has not been reported. It is reprinted in Appendix B hereto, p. B-1, *infra.*

The Order Denying Review of the Supreme Court of the State of California has not been reported. It is reprinted in Appendix C hereto, p. C-1, *infra.*

JURISDICTION

The judgment and opinion of the Court of Appeal of the State of California in and for the Third Appellate District, denying the petition for a peremptory writ of mandate, was rendered on June 23, 1986. The Court of Appeal denied a timely petition for rehearing on July 18, 1986. Thereafter, on August 28, 1986, the Supreme Court of the State of California denied a petition for review. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Clause 2 of Article VI of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 7 of the Labor-Management Relations (Taft-Hartley) Act ("LMRA"), as amended, 29 U.S.C. § 157 (1947), provides in pertinent part as follows:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining . . .

Section 203(d) of the LMRA, 29 U.S.C. § 173(d) (1978), states, in part, as follows:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

STATEMENT OF THE CASE

Petitioner, Simpson Paper Company ("Simpson," the "Employer" or the "Petitioner") challenges that part of a decision of the Division of Occupational Safety and Health of the Department of Industrial Relations for the State of California (the "Division" or "Cal-OSHA") which holds that Simpson is required to pay the full cost of safety shoes purchased by employees at one of its mills. Petitioner's collective bargaining agreement at that mill requires only that Simpson pay a portion of the total purchase price of a pair of safety shoes. A labor Arbitrator likewise held that Simpson had to pay only a portion of the total purchase price of the shoes.

This case, therefore, presents the Court with an extremely important question of federal preemption. The action taken here by a state agency, attempting to maximize its own importance and role by disregarding Con-

gress' carefully balanced scheme for labor relations, makes this case truly one of national concern. It is critical that this Court grant certiorari and deal with the issues raised, for, as is apparent in this case, the state courts of this nation do not fully understand federal labor law and therefore cannot weigh correctly the importance of, and reasons for, preemption of such state activity.

The Parties' Negotiations

Simpson is a manufacturer of high grade paper. It operates a mill in Shasta, California. Simpson has had successive collective bargaining agreements with the United Paper Workers International Union, Anderson Local No. 1101 (the "Union") since 1972 (Jt. Exhs. C, D, E, F, H; Decl. of Dean Childers, p. 1, Exhs. B, C).[1]

These collective bargaining agreements have consistently required Simpson to make *partial reimbursement* for the cost of its employees' safety shoes. At the Union's request, that amount has increased (Emp. Exh. 3, p. 4; Tr. James 89-90). In 1976, 1977, 1979 and 1982, the Union

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[1]References to exhibits introduced into the record below will be as follows: Simpson's Exhibits will be "Emp. Exh. _____"; the Division's Exhibits will be "Div. Exh. _____"; and Joint Exhibits will be "Jt. Exh. _____." Simpson transcribed the tapes of the hearing and provided the Division a copy before briefs were filed with the hearing officer of the Division. A copy of those portions of the transcript relied upon by Petitioner are attached to the petition for writ of mandate filed with the Court of Appeal as Appendix "E." References to that transcript are "Tr. [witness' name] [page number typed at the bottom of the referenced page]." The parties relied on the transcript before the hearing officer of the Division without objection.

"Decl. of Dean Childers _____" refers to the Declaration of Dean Childers filed with the Court of Appeal in support of the Employer's petition for rehearing.

demanded and received substantial wage increases during collective bargaining negotiations, but the Union did not request an increase with respect to safety shoe reimbursement (Tr. James 102-04; Tr. Childers 72-74; Jt. Exhs. C, D, E, F, Decl. of Dean Childers, pp. 2-3). In 1985, the Union, not Simpson, proposed a change in the safety shoe allowance. Simpson refused the Union's proposal that it pay a $150.00 safety shoe allowance. The Union later accepted Simpson's counterproposal by which Simpson, as part of the overall economic package, agreed to increase its share of the cost of a pair of safety shoes in an amount *less than* that proposed by the Union (Decl. of Dean Childers, p. 4). The 1982 and 1985 negotiations occurred *after* Cal-OSHA issued its so-called Order to Take Special Action.

The Order to Take Special Action

In September 1980, Cal-OSHA issued and served its Order to Take Special Action (App. A, A-1 to Petition).[2] The order was amended, and it was appealed by Simpson, which appeal resulted in tape recorded administrative hearings held before a hearing officer. In November 1981, the hearing officer signed her proposed decision and forwarded it to the Chief of the Division. Chief Carter reviewed the proposed decision and, after making minor changes, published and served it on January 14, 1982 (App. B to Petition). The federal question sought to be reviewed was first raised before the hearing officer through Petitioner's appeal of the Order to Take Special Action. The hearing officer concluded that the issue of who was to pay for safety shoes had not been the subject

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[2]"App. ____ to Petition" refers to the appendices to the petition for writ of mandate originally filed with the Court of Appeal.

of contract negotiations and further found that the Arbitrator's decision was not controlling (App. B to Petition).

On February 11, 1982, Petitioner filed its petition for writ of mandate with the Court of Appeal, challenging that part of the decision which held that Simpson was required to pay the entire cost of a pair of safety shoes. The issue of federal preemption was raised in the petition for writ of mandate filed originally with the Court of Appeal. The three-judge panel, with a blistering dissent, held that the state's order was not preempted by federal law.

In dissent, Judge Puglia agreed with the Employer that the Division's order may not issue in contravention of the terms of an existing collective bargaining agreement between the Employer and the Union (p. A-13, *infra*). Judge Puglia noted that the majority conceded that (1) who is to pay for required safety shoes is a negotiable item; and (2) immediately preceding the order challenged by the petition for writ of mandate, there existed a collective bargaining agreement between Simpson and the Union requiring Simpson to pay only $4.00 toward the price of the safety shoes (p. A-14, *infra*). Judge Puglia reasoned as follows (pp. A-18-A-19, *infra*):

> [I]f the state law *oversteps its purpose* of assuring worker safety and health (See Lab. Code, § 6300) so as to effect an unjustifiable interference with economic subjects traditionally left to the bargaining process, the policies favoring collective bargaining and industrial self-government which underlie federal labor relations law (see Barrentine v. Arkansas-Best Freight System (1981) 450 U.S. 728, 735 [67 L.Ed.2d 641, 650]) may well prevail over and render the state statute unconstitutional. (Cf. Terminal R. Assn. v. Brotherhood of R. Trainmen (1943) 318 U.S.

1, 7-8 [87 L.Ed. 571, 578]; Industrial Welfare Com. v. Superior Court (1980) 27 Cal.3d 690, 728, particularly fn. 16; Hentzel v. Singer Co. (1982) 138 Cal.App.3d 290, 296-297, fn. 4.) Even where a competing claim in a second forum is based on a *federal* statute, deference is given to an arbitrator's labor relations decision which resolves rights arising out of the collective bargaining process unless the federal statute in question guarantees employees a minimum right which cannot be waived or abridged by contract. (See Barrentine v. Arkansas-Best Freight System, supra, 450 U.S. at pp. 736, 745 [67 L.Ed.2d at pp. 650, 656-657]; see also Alexander v. Gardner-Denver Company (1974) 415 U.S. 36 [39 L.Ed.2d 147]; McDonald v. West Branch (1984) ____ U.S. ____ [80 L.Ed.2d 302].) Common sense would seem to dictate that where, as here, the necessity of wearing foot protection is not in question, *the economic issue of who shall pay for such clothing is a matter so close to the heart of free labor market arrangements that it should be of no concern to the Division* so long as a binding agreement between labor and management has been reached. [Emphasis supplied in part; footnote omitted.]

Petitioner's federal question was again raised in its petition for rehearing filed with the Court of Appeal on July 7, 1986. The petition for rehearing was denied summarily on July 18, 1986 (p. B-1, *infra*). The federal issue was also raised in Petitioner's petition for review filed with the California Supreme Court on July 28, 1986. The petition for review was denied summarily on August 28, 1986 (p. C-1, *infra*).

The Arbitration

At about the same time that the above-described proceedings were initiated, the parties also litigated a grievance filed by the Union alleging that the Petitioner was obligated to pay the full cost of the safety shoes it required its employees to wear. The Petitioner rejected the Union's grievance and the matter was set for final and binding arbitration (Tr. James 95-97, 111-12; Tr. Childers 73; Emp. Exh. 1). A hearing was held before Arbitrator Sam Kagel who decided that Simpson was correct in its position. On September 14, 1981, Arbitrator Kagel concluded that Simpson and the Union were contractually bound by their collective bargaining agreement to the arrangement by which Simpson had to pay only a small amount of the cost of a pair of safety shoes (Emp. Exh. 3, pp. 5, 6).

REASONS FOR GRANTING THE WRIT

I

The Court Of Appeal's Decision Is In Clear Conflict With Federal Labor Law And Policy And With Decisions Of This Court Holding That State Action Which Interferes With Collective Bargaining Is Preempted By Federal Law.

This case presents a clear cut issue of far-reaching precedential value. The Division's Order to Take Special Action directly conflicts with a specific economic provision of Simpson's collective bargaining agreement. The federal labor law scheme does not tolerate such interference.

The issue in this case is purely economic. It is a question of who will pay for certain shoes; there is no dispute that the shoes should be worn. It is eminently

obvious that the answer to the question of who shall come forward with the money to purchase safety shoes is one that is economic. Paying for the shoes is a readily ascertainable cost item, easily expressed in dollars.[3]

Federal law requires that Simpson and the Union bargain regarding the wages, hours and working conditions of Simpson's employees (*see* section 8(d) of the LMRA, 29 U.S.C. § 158(d) (1974)). These are mandatory subjects of bargaining and Congress intended that Simpson and the Union resolve their differences regarding them without outside interference. *Teamsters Local 24 v. Oliver,* 358 U.S. 283 (1959); *NLRB v. Wooster Division of the Borg-Warner Corp.,* 356 U.S. 342 (1958). The majority of the Court of Appeal conceded that it is clear that the issue of who is to pay for safety equipment is a mandatory subject of collective bargaining (p. A-10, *infra*); *Southeastern Michigan Gas Co.,* 198 N.L.R.B. 1221 (1972), *enforced,* 485 F.2d 1239 (6th Cir. 1973); *Webster Outdoor Advertising Co.,* 170 N.L.R.B. 1395 (1968), *enforcement denied on other grounds,* 419 F.2d 726 (2d Cir. 1969).

Moreover, there is no doubt that the parties reached an agreement on this mandatory issue. From 1972 until the present, pursuant to the collective bargaining agreements, Simpson has paid an amount toward the purchase price of a pair of safety shoes, but *never* the full amount.

Manifestly, the lower court's ruling prevents and precludes the contracting parties from carrying out their own agreement upon a subject on which federal law demands bargaining. Such a result clearly frustrates the

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[3]Indeed, one of the Division's own witnesses, Ken Brown, admitted that the issue is not safety, as a pair of safety shoes is not made more safe by the fact that Simpson pays for them (Tr. Brown 38-39).

parties' solution of their problem.[4] Federal law does not and should not permit such a result.

At the core of the LMRA is section 7, which specifically gives employees the right to organize collectively, to designate representatives of their own choosing and to negotiate terms and conditions of their employment. 29 U.S.C. § 157 (1947). The chief doctrine of federal labor law preemption is that the parties meet on an even basis, free from state interference.

> [S]tate attempts to influence the substantive terms of collective-bargaining agreements are as inconsistent with the federal regulatory scheme as are such attempts by the NLRB . . .

Lodge 76, Machinists v. Wisconsin Employment Relations Comm'n, et al., 427 U.S. 132, 153 (1976).

> A local government, as well as the Labor Board, lacks the authority to ' "introduce some standard of properly 'balanced' bargaining power" . . . or to define "what economic sanctions might be permitted negotiating parties in an 'ideal' or 'balanced' state of collective bargaining" ' . . . The settlement condition imposed by [the local government] . . . destroyed the balance of power designed by Congress . . .

Golden State Transit Corporation v. City of Los Angeles, 475 U.S. ____, 106 S.Ct. 1395, 54 U.S.L.W. 4329, 4332 (1986) (citations omitted).

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[4]In fact, the Division's own hearing officer conceded by her silence that requiring Simpson to pay the entire cost of the safety shoes would take from the Employer and give to the Union that which the latter refused even to try to obtain prior to 1979 and was flatly refused by Simpson in 1979 and again in 1985.

The Court of Appeal's decision awarding the Union what it failed to obtain at the negotiating table directly conflicts with this Court's ruling in *Teamsters Local 24 v. Oliver,* 358 U.S. 283. There, a provision of a collective bargaining agreement set minimum rentals to be paid when a truck owner-operator leased his truck and services to a carrier. One such owner-operator, joined by several carriers, sued in state court to enjoin the enforcement of that provision. The state court granted the injunction on the ground that the challenged provision of the agreement violated the state's anti-trust law.

This Court reversed, noting first that the challenged contractual provision set wages in certain situations, a mandatory subject of bargaining under the LMRA. Application of the state's anti-trust law would prevent the parties from carrying out their agreement on the issues arrived at through the bargaining process. Congress had not affirmatively indicated that the states could limit the content of collective bargaining agreements with respect to their anti-trust implications. Accordingly, this Court unequivocally held the state law preempted. *Id.* at 295-96. The Court concluded that *any* limitation on the federal policy of encouraging collective bargaining must come from Congress and not a state. *Id.* at 296; *accord Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202 (1985); *Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504, 525-26 (1981); *Teamsters Local 20 v. Morton,* 377 U.S. 252, 260 (1964).

In this case, it is the state which would aid the Union that lacked the economic power to force Simpson to grant the terms it sought. But *Oliver* and its progeny prohibit the state from substituting its power for the economic power available to a party to a collective bargaining relationship. As the Court declared in *Oliver*:

> [T]he conflict here is between the federally sanctioned agreement and state policy which seeks specifically to adjust relationships in the world of commerce. If there is to be this sort of limitation on the arrangements that unions and employers may make with regard to these subjects, pursuant to the collective bargaining provisions of the Wagner and Taft-Hartley Acts, it is for Congress, not the States, to provide it.

358 U.S. at 297. *A fortiori,* Cal-OSHA has absolutely *no basis* for attempting to substitute its position for the parties' bargained for position.

It cannot be emphasized enough that safety is not an issue in this case; rather, the issue is who must *pay* for safety shoes which employees wear and which all parties agree they should and must wear. The record is devoid of any claim that there is a disproportionate number of foot injuries at Simpson; that employees are not able to pay for the shoes; that employees are not purchasing the best and most expensive safety shoes money can buy; or that the Employer is guilty of over-reaching or bad faith. No claim[5] and certainly no showing was made even to suggest

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[5]Not until the case reached the California Supreme Court did Cal-OSHA even attempt to rationalize its position as being somehow related to safety. Its after the fact claim is that employees "*may hesitate,* for economic reasons, to replace such equipment . . ." (Answer to Petition for Review, p. 10, emphasis added). There is absolutely nothing in the record to support this speculative position vis-a-vis Simpson. Far to the contrary, as noted above, the record is devoid of any factual basis for the claim. In *American Textile Mfrs. Inst., Inc. v. Donovan,* 452 U.S. 490, 539 (1981), this Court rejected post hoc rationali even where, unlike this case, they had merit. Cal-OSHA's second justification is that the Employer is "in the best economic position to assume this financial responsibility and if necessary pass this cost onto consumers . . . " Again, there is abso-

that employee safety is at issue. Moreover, federal law clearly does *not* require the Employer to pay for safety equipment. *American Textile Mfrs. Inst., Inc. v. Donovan,* 452 U.S. at 538, 540; *Budd Company v. Occupational Safety and Health Review Comm'n,* 513 F.2d 201 (3d Cir. 1975).

Scores of collective bargaining agreements covering thousands of employees across the nation will be negotiated this year alone, just as Simpson reached a settlement here. Many of those agreements will provide which party pays for safety equipment or clothing or shoes and the amount of such payments. Those numerous employers, unions and employees involved need to know the potential effect of a state agency's orders when the parties meet to negotiate. They need to know whether their agreements on such a critical economic issue are final and binding. Plenary consideration of the matter by this Court is essential.

II

The Court Of Appeal's Decision Is Contrary To Federal Law Mandating That The Arbitrator's Decision Be Given Full Force And Effect.

Federal law favors the resolution of disputes between employers and unions by means of final and binding arbitration. Neither the courts nor any governmental agency may interfere with this important cog in the federal labor law scheme.

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lutely nothing in the record to substantiate such social tinkering, and no basis for concluding that Cal-OSHA has the expertise to engage in it. It was just such meddling with the marketplace that Congress sought to and did prevent by preempting interference with the substance of employer-union negotiations. *Teamsters Local 24 v. Oliver,* 358 U.S. 283.

On May 21, 1981, an arbitration was held before Arbitrator Sam Kagel, Esq. Thus, not only have the parties agreed that the matter is one of contractual interpretation, and that the matter should be heard by a labor arbitrator, but they arbitrated the case and have received the answer of the Arbitrator — the person whose decision *both parties* bargained for and agreed would be final and binding.

Ever since the *Steelworkers* trilogy,[6] one fundamental principle of labor law is that if a dispute is arbitrable, then only one person may resolve it — the parties' chosen arbitrator. In *United Steelworkers v. American Mfg. Co.*, 363 U.S. at 566, this Court held that the federal policy favoring arbitration could only be effectuated "if the means chosen by the parties for the settlement of their differences under a collective bargaining agreement is given full play."

It is obvious that the parties have agreed, both in their collective bargaining agreement and by their submission of the dispute to arbitration, that the matter of who will pay for safety shoes is a *contractual matter* that must be resolved by arbitration. Consequently, Cal-OSHA's order, which is contrary to the arbitrator's decision, must be dismissed. Federal labor policy requires that the arbitration be afforded its *preferred position* in the scheme of labor relations. Any interference with the arbitrator's decision can only be viewed as a direct interference with the federal labor scheme within which arbitration, at least

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[6]The *Steelworkers* trilogy refers to the landmark decisions of this Court on June 20, 1960, i.e., *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

since the *Steelworkers* trilogy, has undeniably been a cornerstone.

Neither *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974) nor *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981) applies to this case. First, both of those cases dealt with Congressional statutes setting forth federal rights and remedies in accordance with Congress' view that (1) the eradication of racial discrimination was of the "highest priority"; and (2) that it was necessary to have a uniform national policy regarding the minimum wage. This Court decided that Congress believed these federal rights were matters of sufficient importance so that they should be finally resolved in court. In this case, Congress has made no such determination. *Cf. Budd Company v. Occupational Safety and Health Review Comm'n*, 513 F.2d at 205-06.

Second, this case, unlike *Alexander* and *Barrentine*, raises no issue with regard to access to court. Discovery is virtually the same in both *fora*. In fact, procedurally, Cal-OSHA's hearing and the arbitration are virtually indistinguishable.

Third, there is no claim but that the Union in this case was four-square behind both the Cal-OSHA hearing and the arbitration. Cal-OSHA's main witnesses were the Union President and the Union Safety Steward. Both testified emphatically and demonstrated that the Cal-OSHA matter, particularly the issue of who shall pay for safety shoes was extemely important to them (*See, e.g.*, Tr. James 103).

Moreover, in contrast to Title VII, Cal-OSHA recognizes the aligned interest of unions and the employees they represent. The employer is required to give the union notice of a pending Cal-OSHA matter and the union is

entitled to appear as an entity at the hearing. Cal. Lab. Code §§ 6314(d), 6601, 6602; Cal. Admin. Code tit. 8, R. 356(a) (1985). There is no procedure for citing a union for a violation of Cal-OSHA as there is under Title VII, where unions in addition to employers can be held liable for an employee's racial discrimination. And, there is clearly no basis for concern that an employee will fail to receive undivided loyalty and support by the union at a related arbitration; clearly no such allegation was made in this case. *Cf. Alexander*, 415 U.S. at 58, n. 19 and *Barrentine*, 450 U.S. at 733.

Fourth, the issue in this case — who shall pay for safety shoes — is patently not "nonwaivable". Indeed, the California Supreme Court in *Bendix Forest Products Corp. v. Division of Occupational Safety and Health*, 25 Cal.3d 465, 472, n. 7 (1979), made it clear that under certain circumstances (for example, as in this case) there can be an agreement between an employer and union as to who specifically shall have to pay for safety shoes. On the other hand, in *Alexander v. Gardner-Denver*, one of the critical issues in the Court's reasoning was that a union could not waive the Title VII statutory right of an employee to be free from racial discrimination, and in *Barrentine*, of extreme import was the long line of this Court's decisions holding rights under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (1938), to be nonwaivable, individually or collectively. Clearly, if Congress has determined that a right is not waivable, even collectively, it follows that an arbitrator's decision precluding the right (e.g., to a federal court trial) will not be final and binding. No such consideration even remotely exists in this case. *Far to the contrary, as noted above, federal law is that employers do not have to pay for such items as safety shoes; no federal right existed to be waived.*

Budd Company v. Occupational Safety and Health Review Comm'n, 513 F.2d at 206-07.

Therefore, the Arbitrator's determination must be upheld as a matter of federal labor law.

III

The Court Of Appeal's Decision Ignores The Realities Of Collective Bargaining And Places An Impossible Burden On Employers And Unions.

As the declaration of Dean Childers demonstrates, the Employer and the Union negotiated for a new collective bargaining agreement in 1982 and 1985 (Decl. of Dean Childers, pp. 2-4). At both sets of negotiations, there were discussions regarding safety shoes. Both sets of negotiations occurred *after* the issuance of the Order to Take Special Action. During the 1982 and 1985 negotiations, Simpson and the Union agreed to divide the Union's proposals into two groups — noneconomic and economic items. The Union agreed that the safety shoe allowance was an economic item and would be discussed after the noneconomic items had been discussed. In 1982 no change was made in the amount to be paid by the Employer for safety shoes, but increases were made in other economic items such as wages and fringe benefits. In 1985, the Employer, as part of the overall economic package, agreed to increase its share of the cost of a pair of safety shoes. The Employer refused the Union's proposal that the Employer pay a $150 safety shoe allowance, and the Union later accepted the Employer's lower counterproposal, resulting in the final settlement of this issue.

From the foregoing, it is apparent that the parties continued to consider the safety shoe issue a negotiable economic item *even after* the Order to Take Special Action

issued. Moreover, the Union was willing to settle for less than full payment for a pair of safety shoes provided the Employer was willing to make other concessions in different economic areas, such as wages and other fringe benefits.

Under the reasoning of the Court of Appeal, however, an employer and union could never agree to split the cost of safety shoes unless there were an Order to Take Special Action and litigation with Cal-OSHA. Such a rule does not afford the parties the freedom to negotiate required by federal law. *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202; *Lodge 76, Machinists v. Wisconsin Employment Relations Comm'n, et al.,* 427 U.S. 132; *Teamsters Local 20 v. Morton,* 377 U.S. 252; *Teamsters Local 24 v. Oliver,* 358 U.S. 283.

The Court of Appeal correctly held that there "clearly existed a consistent past practice governing reimbursement for safety shoes which became as much a part of the contract as if expressly stated" (p. A-10, *infra*). The Court nevertheless considered as key the fact that this express agreement occurred before the issuance of the Order to Take Special Action. Under this reasoning, there could never be a binding agreement between the parties to pay for safety shoes absent litigation with Cal-OSHA. This is so because, except in rare instances (as the Declaration of Mr. Childers demonstrates occurred in this case), there will not be an Order to Take Special Action when the parties negotiate this critical economic item.

The policy considerations underpinning preemption are too strong to permit such a result. An agreement between an employer and union on an economic item such as who pays for safety shoes cannot depend for its efficacy on when or whether Cal-OSHA issues an Order to Take

Special Action. Therefore, the Court should hold that Cal-OSHA's order was preempted. *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202; *Lodge 76, Machinists v. Wisconsin Employment Relations Comm'n, et al.*, 427 U.S. 132; *Teamsters Local 20 v. Morton,* 377 U.S. 252; *Teamsters Local 24 v. Oliver*, 358 U.S. 283.

IV

The Court Of Appeal's Decision Is Contrary To Federal OSHA Law.

In *Budd Company v. Occupational Safety and Health Review Comm'n,* 513 F.2d 201, the court stated the *federal rule* that the issue of who was to bear the cost of required protective footwear was negotiable. The court held as follows:

> Unlike other labor statutes with essentially economic purposes, the Act [Fed/OSHA] is concerned solely with safety and health in the work situation. Prescription of cost allocations is not essential to the effectuation of the Act's objectives. . . . *The question of cost allocation, on the other hand, is a question to be resolved between employer and employee.* In our judgment, it is an appropriate subject for collective bargaining.

513 F.2d at 203 (footnotes omitted; emphasis added).

The court further noted that neither the Act nor the regulation explicitly required that the employer finance the implementation of the safety measure in question (*id.* at 206); and since the protective footwear was required regardless of cost allocation, the decision of the Commission in no way diminished "the employer's obligation to ensure that safety shoes are in fact worn when required." *Id.* (footnote omitted); *see also American Textile Mfrs.*

Inst., Inc. v. Donovan, 452 U.S. at 540 (where this Court stated that the federal Occupational Safety and Health Act "in no way authorizes OSHA to repair general unfairness to employees that is unrelated to achievement of health and safety goals. . . .").

Cal-OSHA may not usurp or negate Simpson's federal right to bargain regarding an economic item — a mandatory subject of bargaining under the LMRA. Federal law does not permit it; indeed, federal OSHA is directly contrary to the Court of Appeal's holding.

CONCLUSION

For the reasons set forth herein, the petition for a writ of certiorari should be granted. The finely balanced federal labor scheme established by Congress depends for its success on the parties' freedom to negotiate without interference at their table from local, state or federal governments. In this case, Cal-OSHA has violated that cornerstone precept to the detriment of Simpson *and all* employers and unions subject to the federal law.

Respectfully submitted,

LITTLER, MENDELSON, FASTIFF & TICHY
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APPENDIX A

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THE THIRD APPELLATE DISTRICT

3 CIV. 21516
SIMPSON PAPER COMPANY,
Petitioner,
v.
DIVISION OF OCCUPATIONAL SAFETY AND HEALTH OF THE DEPARTMENT OF INDUSTRIAL RELATIONS FOR THE STATE OF CALIFORNIA,
Respondent.

Filed June 23, 1986.

We review a decision of the Division of Occupational Safety and Health of the Department of Industrial Relations (Division) which upheld an order directing petitioner Simpson Paper Company (Simpson) to provide and pay for protective safety shoes for certain of its employees.

We issued an alternative writ of mandate and a stay pending our review of the validity of the Division's order. Simpson, seeking a peremptory writ, contends: (1) the Division, by issuing the order, exceeded its statutory jurisdiction and enforcement powers, violated the supremacy clause of the United States Constitution and denied it due process of law; and (2) its collective bargaining agreement covers the subject of payment for safety shoes, thus preempting and precluding the Division's order as a matter of federal labor law. We conclude that the Division had authority to issue the challenged

order and that the order is valid. We shall therefore deny the petition.

FACTS

Simpson is a manufacturer of high-grade paper at its Shasta Mill. It is also an employer engaged in and affecting commerce within the meaning of the National Labor Relations Act. (29 U.S.C. § 151 et seq.) The Division conducted an inspection of the Shasta Mill, after which it issued the order which is the subject of this dispute. The order was issued on September 19, 1980.

Simpson took over the operation of the Shasta Mill in 1972 from Kimberly-Clark. At that time Kimberly-Clark had a collective bargaining agreement with United Paperworkers International Union, Local No. 1101, AFL-CIO (Union). Simpson continued the bargaining relationship with the Union and signed collective bargaining agreements in 1974, 1976, 1977, and 1979. Each agreement contained identical provisions related to safety.[1] None of the agreements ever contained a requirement that Simpson pay for safety shoes or any other safety equipment. The issue was never formally discussed as a part of contract negotiations.

When Simpson purchased the mill it continued Kimberly-Clark's practice of reimbursing employees in

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[1]Those provisions read: "20.01 Supervisors are to confine their instructions and procedures within the generally accepted standards of safe practices. [¶] 20.02 Employees are to comply with all safety rules established, published, and made available to the employee by the Company from time to time. [¶] 20.03 The Local Union shall appoint two representatives to serve as members of the Company's Safety Steering Committee, which meets at least once a month to consider various safety problems and safety rules."

the amount of $2 per pair of safety shoes. At the Union's request, Simpson later agreed to raise that figure to $4 per pair.[2] That was the only request the Union made for an increase since Simpson assumed operation of the mill, although the Union negotiated for and received substantial wage increases.

Since 1973 Simpson has been subject to the California Occupational Safety and Health Act (Lab. Code. § 6300 et seq.)[3] requiring it to furnish safety devices and safeguards to ensure safe and healthful employment. (§ 6401.) Since 1974 an implementing regulation has been in effect requiring foot protection under generally defined circumstances. (Cal. Admin. Code, tit. 8, § 3385.)[4]

In 1979, during contract negotiations (although the matter was not on the parties' agenda), Simpson and the Union discussed a Union grievance claiming Simpson was required to pay for the safety shoes. Simpson rejected the Union's claims, denied the grievance, and refused to pay for the shoes. At these negotiations maintenance employees received an increase in their tool allowance and Simpson granted the Union's request for a wage increase.

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[2]The total cost for a pair of safety shoes is between $50 and $60.

[3]All further references, unless otherwise indicated, are to the Labor Code.

[4]The text of that regulation is as follows: "(a) Appropriate foot protection shall be required for employees who are exposed to foot injuries from hot, corrosive, poisonous substances, falling objects, crushing or penetrating actions, which may cause injuries or who are required to work in abnormally wet locations. [¶] (b) Footwear which is defective or inappropriate to the extent that its ordinary use creates the possibility of foot injuries shall not be worn. [¶] (c) Safety-toe footwear for employees shall meet the requirements and specifications in American National Standard for Men's Safety-Toe Footwear, Z41.1-1967."

The Union's grievance went to arbitration, resulting in a decision by arbitrator Sam Kagel on September 14, 1981, in favor of Simpson. Mr. Kagel stated:

"The record indicates that in 1974 and 1976, on a wage reopener in 1977 and in June of 1979, the Parties had collective bargaining sessions relative to the Collective Bargaining Agreement between the Company and the Union. The evidence is clear that in none of those negotiations did the Union seek to provide for full payment for safety shoes. The past practice relative to some payment for safety shoes is of such duration that it has in effect become part of the Agreement between the Parties and this is specifically so in that the Company increased the amount of reimbursement as a result of the direct request of the Union. . . .

"The record is clear therefore that the Union was aware of the subject matter involved in this arbitration; that in effect it had negotiated by way of a practice what amounts to an addition to section XX of the Agreement, at least insofar as safety shoes are concerned."

"[I]t is clear that expense for certain items whether they be for safety purposes or otherwise is a mandatory subject of bargaining, that in this case it was in effect bargained by the Parties by them recognizing and at the instigation of the Union changing to the advantage of the Union a practice relative to reimbursement of safety shoes; accordingly this was recognized by the Parties as a subject of collective bargaining . . . "

The arbitrator concluded that the agreement between the parties relieved Simpson of any statutory duty to pay the entire cost of the shoes.

On September 19, 1980, the Division issued its order to take special action which specifically mandated the use of

designated safety shoes for various enumerated employees. It also directed Simpson to pay for such equipment.[5]

A Division hearing officer upheld the Division's order requiring Simpson to pay for the safety shoes. The officer found no explicit reference in the collective bargaining agreement to payment for safety shoes, and concluded that the issue was not the subject of contract negotiations. The officer made the following legal conclusions: (1) there was no agreement in the parties' contract on the

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[5]The special order, in relevant part, provides: "Foot protection is required for employees in the following activities or areas: [¶] (a) Calendar Progression [¶] (b) Winder Progression [¶] (c) Coating Plant [¶] (d) Cutter Progression [¶] (e) Trimmer Progression [¶] (f) Sheet Packaging Progression [¶] (g) Maintenance [¶] (h) Sorters [¶] (i) Repulper [¶] (j) Materials Handling Laborer [¶] (k) Small Store Employees

"The employees involved in the above activities are exposed to foot injuries while handling paper rolls, shafts, gears, platforms, redi-powers and outriggers non-rider power lifts, calendar rolls and other tools and materials capable of falling and rolling or crushing injuries to employees' toes.

"External toe protection worn over employee shoes or boots is inappropriate and shall not be worn by employees while performing activities which entail: [¶] (1) Walking on uneven surfaces. [¶] (2) Climbing of ladders or stairs. [¶] (3) The operation of Redi-power on outrigger non-rider powered lifts. [¶] (4) The operation of roll lifts, fork lifts, or other rider powered lifts.

"This specifically includes maintenance employees, calendar employees, cutters and second cutters, and rider and non-rider power lift employees. The Division finds that toe caps for these employees dramatically increases the likelihood of tripping, falling or slipping in their performance of the above tasks.

"Therefore, the employer shall pay for and provide to these employees, acceptable foot protection in the form of steel toed safety boots or shoes, meeting the American National Standard for Men's Safety-Toe Footwear, Z 41.1-1967"

issue of payment for safety shoes; (2) the Division is not preempted from enforcing its order by reason of the arbitration proceeding and order; and (3) the Division has the authority to issue its order, and the order does not violate Simpson's rights. Simpson then filed its original petition for mandate in this court.[6]

I

We examine first the authority of the Division to issue the challenged order. By statute, the primary responsibility for safety is placed on the employer. Section 6400 provides that "Every employer shall furnish employment and a place of employment which are safe and healthful for the employees therein." The employer is required to

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[6]Section 6308 provides that, "All orders, rules, regulations, findings, and decisions of the division made or entered under this part may be reviewed by the Supreme Court and the courts of appeal as may be provided by law." The California Constitution provides in article VI, section 10 that Courts of Appeal have ". . . original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition." According to rules of statutory construction, since superior court review is omitted from section 6308, while included in other portions of the California Occupational Safety and Health Act, an "implied negative" grant of power excludes superior court review. (Wildlife Alive v. Chickering (1976) 18 Cal.3d 190, 196.)

We note the validity of the Division's safety orders was recently attacked directly by writ of mandamus in the Court of Appeal without question by our Supreme Court. (Bendix Forest Products Corp. v. Division of Occupational Saf. & Health (1979) 25 Cal.3d 465, 467, 469.)

Therefore, we agree with the parties that this court's jurisdiction is exclusive of the superior court's. (See San Francisco Bay Area Rapid Transit Dist. v. Division of Occupational Saf. & Health (1980) 111 Cal.App.3d 362, 364.)

". . . furnish and use safety devices and safeguards, and shall adopt and use practices . . . which are reasonably adequate to render such employment and place of employment safe and healthful. . . ." (§ 6401.)

The Division is the agency charged with enforcing and administering "all laws and lawful standards and orders, or special orders" requiring a safe working environment and protection of employee health. (§ 6307.)[7]

Section 6305 defines "occupational safety and health standards and orders" as follows: "(a) 'Occupational safety and health standards and orders' means standards and orders adopted by the standards board pursuant to Chapter 6 (commencing with Section 140) of Division 1 and general orders heretofore adopted by the Industrial Safety Board or the Industrial Accident Commission." "Special orders" are defined as orders ". . . written by the chief or the chief's authorized representative to correct an unsafe condition, device, or place of employment which poses a threat to the health or safety of an employee and which cannot be made safe under existing standards or orders of the standards board. . . ." (§ 6305, subd. (b).)

Simpson challenges both the authority for the Division's action and the legality of its hearing procedures. It does not, however, contest the Division's factual determinations that safety shoes, rather than toe caps, must be worn in certain job categories and that safety shoes are required in certain departments. Its claims are meritless.

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[7]Section 6307 provides: "The division has the power, jurisdiction, and supervision over every employment and place of employment in this state, which is necessary to adequately enforce and administer all laws and lawful standards and orders, or special orders requiring such employment and place of employment to be safe, and requiring the protection of the life, safety, and health of every employee in such employment or place of employment."

The responsibility of the Division to provide for the safety of workers is not limited by the statutory provision in section 6305 for issuance of special orders to correct unsafe conditions. The Division's powers and duties extend to administering and enforcing " 'all laws and lawful standards and orders or special orders . . . .' " (§ 6307; *Bendix,* 25 Cal.3d at p. 470.) Section 6308 contains broad enforcement authority.[8] The Division's power under this section and other statutory provisions " 'make clear that the terms of the legislation are to be given a liberal interpretation for the purpose of achieving a safe working environment. [Citation.]' " (*Ibid.*)

Ample authority supports the Division's action. Although no general law refers to foot protection, the Standards Board, pursuant to authority set forth in section 142.3, has adopted a regulation or standard which provides that foot protection may be required. (Cal. Admin. Code, tit. 8, § 3385, subd. (a).) It was pursuant to sections 6308 and the foregoing regulation that the Divi-

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[8]In pertinent part, section 6308 provides: "The division, in enforcing occupational safety and health standards and orders and special orders may do any of the following: (a) Declare and prescribe what safety devices, safeguards, or other means or methods of protection are well adapted to render the employees of every employment and place of employment safe as required by law or lawful order. [¶] (b) Enforce Section 25910 of the Health and Safety Code and standards and orders adopted by the standards board pursuant to Chapter 6 (commencing with Section 140) of Division 1 of the Labor Code, for the installation, use, maintenance, and operation of reasonable uniform safety devices, safeguards, and other means or methods of protection, which are necessary to carry out all laws and lawful standards or special orders relative to the protection of the life and safety of employees in employments and places of employment. [¶] (c) Require the performance of any other act which the protection of the life and safety of the employees in employments and places of employment reasonably demands."

sion issued its "Order to Take Special Action" directing Simpson to provide safety shoes at company expense. This action is virtually identical to that upheld in *Bendix*.[9] (See *Bendix*, 25 Cal.3d at pp. 470-471.)

Simpson also asserts the Division's hearing officer is subject to a conflict of interest because her superior was counsel for the Division in *Bendix*. This claim is unmeritorious. Simpson neither cites authority for its proposition nor demonstrates how the fact the hearing officer's superior was counsel for the Division in *Bendix* demonstrates a conflict of interest or bias.

II

We next examine the validity of the order. Simpson's primary contention is that the Division has entered into a dispute that arose as a grievance, attempting to alter the bargaining relationship between management and labor on an issue that is not a matter of safety, but of cost, i.e., who shall pay for safety shoes. Such an intrusion into the bargaining process, Simpson reasons, where the parties' agreement requires only that Simpson pay $4 for a pair of safety shoes, is contrary to federal labor law.

Our Supreme Court addressed a similar issue in Bendix Forest Products Corp. v. Division of Occupational Saf. & Health, supra, 25 Cal.3d 465. There, a lumber industry employer sought review of a decision by the Division ordering the employer to provide protective gloves or mittens to its employees at company expense. The custom in the industry was for the employees to pay

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[9]Simpson attempts to distinguish *Bendix* on the ground that safety gloves and safety shoes are different. But Simpson fails to demonstrate *how* these differences should change the analysis or compel a different result.

for protective devices. Bendix required its employees to wear gloves or mittens, and provided them on a cash or payroll deduction basis. (*Id.*, at pp. 467, 470, 471.)

The Supreme Court unanimously held the Division had the authority to enforce the laws and standards regarding protective hand coverings at the Bendix plant, had correctly interpreted the law and standards to require Bendix to bear the expense, and had properly enforced the applicable safety regulation. (*Id.*, at p. 473.)

In a footnote, the court noted the record contained no evidence of an agreement in the contract between management and labor regarding payment for protective clothing. It therefore declined to express an opinion on the issue " . . . whether . . . the payment of required safety equipment and clothing can be a proper subject of collective bargaining." (*Id.*, at p. 472, fn. 7.)

Simpson claims that because the parties here made an agreement on the subject of payment for safety shoes, the issue left undecided in *Bendix* is squarely presented.

While we disagree with the Division's posture that no contract existed covering reimbursement for the cost of safety shoes, we determine that the rule in *Bendix* nonetheless governs this case.

As the arbitrator held in the grievance arbitration, there clearly existed a consistent past practice governing reimbursement for safety shoes which became as much a part of the contract as if expressly stated. (United Steelworkers v. Warrior and G. Nav. Co. (1960) 363 U.S. 574 [4 L.Ed.2d 1409].) It is equally clear that the issue of who is to pay for safety equipment is a mandatory subject of collective bargaining. (29 U.S.C. § 158(d); Southeastern Michigan Gas Company, 198 NLRB 1221 (1972);

Webster Outdoor Advertising Co., 170 NLRB 1395 (1968).)

It is uncontroverted, however, that all contract negotiations relating to the reimbursement occurred *before* the issuance of the order to take special action. Prior to its issuance, there existed no specific mandatory duty on the part of the employer to provide particularly described equipment for the enumerated employees. That duty arose only upon issuance of the order here complained of.

Where, as here, there was no mutually recognized obligation of the employer to pay for the safety shoes for the enumerated employees before the order, it is untenable to urge that the employees bargained away that to which they had a statutory entitlement.[10]

Hence, as in *Bendix,* we find no agreement applicable to the period after issuance of the order on September 19, 1980. Therefore, we too do not reach the question of whether the payment for required safety equipment can be shifted to the employee by collective bargaining.

Simpson's contention that the Division's interference with the collective bargaining process is absolutely preempted by federal labor law is also untenable. It is settled that state regulation of the health, safety and welfare of workers is not preempted by federal labor law. (Terminal R. Asso. v. Brotherhood of R. Trainmen (1943) 318 U.S. 1, 6-7 [87 L.Ed. 571, 577-578].) In Industrial Welfare Com. v. Superior Court (1980) 27 Cal.3d 690, 727-728, the court sanctioned regulation of employee welfare as well as the health and safety of workers, even though the

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[10]The words "provide" and "furnish" in sections 6403 and 6401 have long since been interpreted to mean that the employer has a duty to pay for obligatory safety equipment. (Oakland Police Officers Association v. City of Oakland (1973) 30 Cal.App.3d 96.)

matters affected may constitute mandatory subjects of collective bargaining. Safety measures are a matter within the province of permissible state regulation, even though they may also be a mandatory subject of collective bargaining.

Simpson's claim that the Division must defer to the arbitrator's decision is equally unavailing. Deference to an arbitral decision is appropriate where the claim is based on rights arising out of the collective bargaining agreement. On the other hand, "... different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers." (Barrentine v. Arkansas-Best Freight System (1981) 450 U.S. 728, 737 [67 L.Ed.2d 641, 651].)

The arbitrator is limited to interpretation of the collective bargaining agreement. (United Steelworkers v. Enterprise Corp. (1960) 363 U.S. 593, 597 [4 L.Ed.2d 1424, 1428].) His interpretation of the parties' contract here (that Simpson had no contractual duty to pay for the shoes) is not inconsistent with the hearing officer's findings. Moreover, where, as here, there is an independent statutory basis for the protection of workers, the arbitrator's decision cannot control matters outside of the collective bargaining agreement.

We conclude that the order does not violate federal labor law and that it is consequently valid and enforceable.

The alternative writ is discharged, the stay dissolved and the petition for writ of mandate denied.

FORD, J.*

I concur:

SPARKS, J.

I respectfully dissent. I agree that the Division of Occupational Safety and Health (Division) has general statutory authority to issue an order directing an industrial employer to pay the cost of safety shoes which must be worn by its employees. But I do not subscribe to the majority's conclusion that such an order may issue in contravention of the terms of an existing collective bargaining agreement between the employer and the employee union.

I disagree with the majority that the decision in Bendix Forest Products Corp. v. Division of Occupational Saf. & Health (1979) 25 Cal.3d 465 governs the outcome of this case. *Bendix* interpreted an employer's obligation to "furnish" safety devices for its employees under Labor Code section 6401 to mean that the employer bears the primary responsibility of paying for required personal protective equipment. However, the record in *Bendix* contained no evidence of a collective bargaining agreement between the employer and the employee union, and the Court expressly left open the question whether the payment for required safety equipment and clothing could be a proper subject of collective bargaining. (*Id.*, at p. 472, fn. 7.) By its own terms, *Bendix* stands only for the principle that, in the absence of a collective bargaining agreement allocating such economic responsibilities, the Division has enforcement authority under section 6401 to issue an

*Assigned by the Chief Justice.

order directing an employer to bear the full expense of safety shoes.

Federal decisions which have considered the issue uniformly recognize that matters touching on worker safety are a proper if not mandatory subject of collective bargaining. (29 U.S.C. § 151 et seq.) (N.L.R.B. v. Gulf Power Company (5th Cir. 1967) 384 F.2d 822, 824-825; Atlantic & Gulf Stevedores v. Occupational Safety (3d Cir. 1976) 534 F.2d 541, 555; Gateway Coal Co. v. Mine Workers (1974) 414 U.S. 368, 379-380 [38 L.Ed.2d 583, 593]; Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 620, 623; Solano County Employees' Assn. v. County of Solano (1982) 136 Cal.App.3d 256, 260-262.)[1] Indeed, the majority so much as concedes that who is to pay for required safety shoes is a negotiable item. Furthermore, the majority concedes that, immediately preceding the order challenged by this petition, there existed a collective agreement between Simpson and the employee union requiring Simpson to pay only $4 toward the price of the safety shoes.

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[1]The federal labor relations law defines mandatory subjects of bargaining as those issues "with respect to wages, hours, and other terms and conditions of employment, . . ." (29 U.S.C.A. § 158(d); McDonald v. Hamilton Elec., Inc. of Florida (11th Cir. 1982) 666 F.2d 509, 513.) As construed by the courts, mandatory subjects are limited generally to " 'issues that settle an aspect of the relationship between the employer and the employees' and that have more than a speculative and insubstantial impact upon that relationship." (*McDonald*, at pp. 513-514.) While the parties are free to bargain on subjects which have only a minimal or indirect effect on the terms and conditions of employment (see Champion Parts Rebuilders, Inc. v. N.L.R.B. (3d Cir. 1983) 717 F.2d 845, 854-855), these permissive matters "may not be made prerequisites to agreements on mandatory items." (N.L.R.B. v. Intern. Union of Op. Engineers, etc. (3d Cir. 1976) 532 F.2d 902, 907.)

Thus a controversy is presented as to whether a collective bargaining agreement which shifts the employer's responsibility for financing personal protective equipment to the employee is antagonistic to the mandate of Labor Code section 6401. Yet the majority avoids the controversy through the device of a dubious distinction between contract negotiations relating to reimbursement which here occurred before issuance of the Division order directing full employer payment and those which might be entered after the issuance of such an order. The majority apparently reasons that Simpson had no statutory duty to pay for the safety shoes prior to the order in question and hence the employees could not have bargained away that to which they did not know they were entitled. The fallacy inherent in this logic is that the Division's order would not in the first instance have been justified as a "specific application of laws and existing regulations" (see *Bendix,* supra, 25 Cal.3d at p. 471) if the Legislature never intended that the employer's responsibility for financing personal safety clothing would prevail over the terms of a collective agreement between management and labor.

When the substantive issue is confronted on its merits, I believe that *Bendix* lends support to rather than detracts from a collective bargaining exception relative to the economic issue here tendered. For, in construing section 6401, the *Bendix* court relied heavily upon a prior Attorney General opinion which stated: "[T]he originally ambiguous word 'furnish' in section 6401 has been interpreted by the Division . . . to mean that the employer must *at his expense* supply personal protective equipment, unless he and his employees — singly or collectively — agree otherwise. This construction, which has long stood unchallenged, is reasonable and within agency authority." (51 Ops. Cal.Atty.Gen. 105, 109 (1968), quoted in *Bendix,* supra, 25 Cal.3d at p. 472; emphasis in

original.) The Attorney General opinion went on to say that, while the primary responsibility for industrial safety rests with the employer, employees may prefer to use their own safety devices which are "highly personal" in nature, "perhaps in return for other concessions from the employer." (51 Ops. Cal.Atty.Gen. at p. 109.) "Where these alternative arrangements are incorporated in the collective bargaining agreement, it would seem absurd to hold that they violate the literal meaning of Section 6401 that 'the *employer* shall furnish.' " (*Ibid.*; emphasis in original.)

Consonant with the views expressed in *Bendix,* I adhere to the reasonableness of the Division's long-standing interpretation. Not only is such an interpretation by the administrative agency charged with enforcing the statute entitled to great weight (see *Bendix,* supra, 25 Cal.3d at p. 472; Carmona v. Division of Industrial Safety (1975) 13 Cal.3d 303, 310), but there is no clear indication that the Division has now altered its position. In this petition the Division's only apparent quarrel is with labor arbitrator Kagel's conclusion that the applicable labor-management agreement did in fact embrace reimbursement for safety shoes. And the pertinent administrative regulation in existence since 1974 does not even speak in terms of "furnish"; it specifies only that appropriate foot protection "shall be required" for employees exposed to certain types of foot injuries. (Cal. Admin. Code, tit. 8, § 3385, subd. (a).)[2]

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[2]Another regulation actually contemplates the situation where employees will own their personal protective equipment. It provides in pertinent part that: "The employer shall assure that employee-owned personal protective equipment complies with standards and regulations prescribed by the Division . . . ." (Cal. Admin. Code, tit., 8, § 3380, subd. (d).)

Moreover, a statutory construction which does not usurp traditional subjects of collective bargaining is consistent with the interpretation given a parallel regulation under the federal Occupational Safety and Health Act. In Budd Co. v. Occupational Safety & Health Rev. Com'n (3d Cir. 1975) 513 F.2d 201, the Third Circuit Court of Appeals upheld the commission's ruling that 29 C.F.R. § 1910.132(a)[3] did not mean that the issue of who was to bear the cost of required protective footwear was nonnegotiable. Instead, the court embraced (*Budd,* at p. 206) the following rationale offered by the commission in support of its ruling: " 'Unlike other labor statutes with essentially economic purposes, the Act [Fed/OSHA] is concerned solely with safety and health in the work situation. Prescription of cost allocations is not essential to the effectuation of the Act's objectives. . . . The question of cost allocation, on the other hand, is a question to be resolved between employer and employee. In our judgment, it is an appropriate subject for collective bargaining.' " (*Id.*, at p. 203, fns. omitted.) The *Budd* court further observed that, unlike other measures specifically imposing on the employer certain expenditures to promote employee health and safety, neither the Act nor the regulation explicitly required that the employer finance the implementation of the safety measure in question. (*Id.,* at p. 206.) And since the protective footwear was

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[3]29 C.F.R. § 1910.132(a) provides: "Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact."

required irrespective of cost allocation, the decision of the Commission in no way diminished "the employer's obligation to ensure that safety shoes are in fact worn when required." (*Ibid.*; fn. omitted.)[4]

If reasonably possible, the courts have an obligation to construe a statute so as to avoid doubts regarding its constitutionality. (People v. Smith (1983) 34 Cal.3d 251, 259.) I question whether a state health and safety standard could be interpreted to impose an unconditional, nontransferrable obligation on the employer to pay the full expense of required personal safety equipment without violating federal preemption principles. (See U.S. Const. art. VI, cl. 2.) For if the state law oversteps its purpose of assuring worker safety and health (See Lab. Code, § 6300) so as to effect an unjustifiable interference with economic subjects traditionally left to the bargaining process,[5] the policies favoring collective bargaining and

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[4]Compare Forging Industry Ass'n v. Secretary of Labor (4th Cir. 1985) 773 F.2d 1436, 1451-1452, where the Fourth District Court of Appeals upheld the validity of a regulation promulgated under Fed/OSHA which expressly mandates that employers must provide hearing protectors at no charge to all employees exposed to an 8-hour time-weighted average of 85 decibels or more. (29 C.F.R. § 1910.95(i)(1).)

[5]Illustrative is American Textile Mfrs. Inst. v. Donovan (1981) 452 U.S. 490, 540 [69 L.Ed.2d 185, 220], where the U.S. Supreme Court emphasized that the federal Occupational Safety and Health Act "in no way authorizes OSHA [Occupational Safety and Health Administration] to repair general unfairness to employees that is unrelated to achievement of health and safety goals, . . ." There, the court considered the validity of an OSHA provision relating to the use of respirators to protect employees from exposure to cotton dust which required the employer to give employees unable to wear a respirator the opportunity to transfer to another position. (*Id.*, 452 U.S. at pp. 536-537 [69 L.Ed.2d at pp. 218-219].) When such transfer occurred, the provision also required the employer to guarantee that the

industrial self-government which underlie federal labor relations law (see Barrentine v. Arkansas-Best Freight System (1981) 450 U.S. 728, 735 [67 L.Ed.2d 641, 650]) may well prevail over and render the state statute unconstitutional. (Cf. Terminal R. Assn. v. Brotherhood of R. Trainmen (1943) 318 U.S. 1, 7-8 [87 L.Ed. 571, 578]; Industrial Welfare Com. v. Superior Court (1980) 27 Cal.3d 690, 728, particularly fn. 16; Hentzel v. Singer Co. (1982) 138 Cal.App.3d 290, 296-297, fn. 4.) Even where a competing claim in a second forum is based on a *federal* statute, deference is given to an arbitrator's labor relations decison which resolves rights arising out of the collective bargaining process unless the federal statute in question guarantees employees a minimum right which cannot be waived or abridged by contract. (See Barrentine v. Arkansas-Best Freight System, supra, 450 U.S. at pp. 736, 745 [67 L.Ed.2d at pp. 650, 656-657]; see also Alexander v. Gardner-Denver Company (1974) 415 U.S. 36 [39 L.Ed.2d 147]; McDonald v. West Branch (1984) ____ U.S. ____ [80 L.Ed.2d 302].) Common sense would seem to dictate that where, as here, the necessity of

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employee suffered no loss of earnings or other employment rights or benefits. (*Ibid.*) The court concluded that OSHA had acted beyond its statutory authority when it issued the wage guarantee portion of the regulation. (*Id.*, 452 U.S. at p. 540 [69 L.Ed.2d at p. 220].) Reasoned the court: "... OSHA never explained the wage guarantee provision as an approach designed to contribute to increased health protection. Instead the agency stated that the 'goal of this provision is to minimize any adverse economic impact on the employee by virtue of the inability to wear a respirator.' " (*Id.*, 452 U.S. at p. 583 [69 L.Ed.2d at p. 219].) Other post hoc rationalizations offered by the agency, while they might have merit, did not serve as a sufficient predicate for agency action. (*Id.*, 452 U.S. at p. 539 [69 L.Ed.2d at p. 220]; but see United Steelworkers of America, etc. v. Marshall (D.C. Cir. 1981) 647 F.2d 1189, 1236, cert. den., 453 U.S. 913 [69 L.Ed.2d 997].)

wearing foot protection is not in question, the economic issue of who shall pay for such clothing is a matter so close to the heart of free labor market arrangements that it should be of no concern to the Division so long as a binding agreement between labor and management has been reached.

Because an existing collective bargaining agreement made Simpson responsible for paying only $4 toward the cost of safety shoes worn by its employees, I would hold that the Division had no statutory authority to issue the contested order requiring Simpson to pay their full cost. Accordingly, I would issue the writ of mandate as prayed.

PUGLIA, P.J.

APPENDIX B

IN THE

COURT OF APPEAL OF THE
STATE OF CALIFORNIA

IN AND FOR THE

THIRD APPELLATE DISTRICT

3 Civil 21516

SIMPSON PAPER COMPANY,
Petitioner,

vs.

DIVISION OF OCCUPATIONAL SAFETY &
HEALTH OF THE DEPARTMENT OF
INDUSTRIAL RELATIONS,
Respondents.

By the Court:

Petitioner's petition for rehearing is denied.

Dated: July 18, 1986

SPARKS, Acting P. J.

* * * * *

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APPENDIX C

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

3rd District, Civil No. 21516

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

SIMPSON PAPER COMPANY,
Petitioner

v.

DIVISION OF OCCUPATIONAL SAFETY
AND HEALTH, etc.,

Respondent.

Petition for review DENIED.

Filed August 28, 1986.

BIRD

Chief Justice

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On November 3, 1986, I served the within Petition for a Writ of Certiorari, in re: "Simpson Paper Company vs Division of Occupational Safety and Health of the Department of Industrial Relations for the State of California" in the United States Supreme Court, October Term, 1986 No. .....;

on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Michael D. Mason
Chief Counsel
Division of Occupational Safety and Health
525 Golden Gate Avenue, Room 616
San Francisco, California 94102

All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on November 3, 1986, at Los Angeles, California

Timothy M. Sill

TIMOTHY M. SILL